No. 09-74

IN THE SUPREME COURT OF THE UNITED STATES

October Term 2008

KEITH SMITH, WARDEN

Petitioner,

v.

MAURICE MASON,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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CAPITAL CASE

QUESTION PRESENTED

Is review by this Court appropriate where: (1) the Warden does not dispute that the Sixth Circuit properly stated the rule of law regarding an ineffective assistance of counsel claim; (2) the Warden contests only the court's straightforward application of this rule to the facts; and (3) the court merely concluded that trial counsel failed "to undertake a reasonable investigation to support [his] strategic decisions about the presentation of mitigation evidence" and therefore did not give deference to counsel's last-minute decision to not further investigate his client's background?

LIST OF PARTIES

The petition accurately lists the parties to the proceeding

TABLE OF CONTENTS

QUESTION PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTIONAL STATEMENT 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

INTRODUCTION 2

STATEMENT OF THE CASE 5

A. After a jury convicted and sentenced Mason to death in state court, he unsuccessfully pursued direct appeals. 5

B. Mason unsuccessfully pursued post-conviction relief in state and federal district court. 6

C. On appeal, the Sixth Circuit noted troubling indications that counsel had failed to properly investigate mitigating evidence and therefore remanded Mason's case for the district court to develop evidence to evaluate his penalty-phase ineffective assistance of counsel claim. 7

D. Reviewing the evidence generated at the evidentiary hearing in a second appeal, the Sixth Circuit held that "trial counsel provided ineffective assistance by failing to interview Mason's family members and investigate the obvious red flags contained in state records suggesting that Mason's childhood was pervaded by violence and exposure to drugs in the home from an early age." 7

1 The Sixth Circuit held counsel's "woefully inadequate" investigative efforts rendered his performance deficient and objectively unreasonable 8

2. The Sixth Circuit held counsel's deficient performance prejudiced Mason because a reasonable probability existed that, had the jurors (who had initially deadlocked) heard the substantial evidence detailing the abusive and unhealthy conditions of Mason's childhood, they might have returned a different penalty-phase decision. 9

3. The Sixth Circuit held that the Ohio Supreme Court unreasonably applied clearly established law because it ignored the principle established in *Strickland* that "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." 12

REASONS FOR DENYING THE WRIT 14

A. The Warden seeks review in this Court merely to change the result in this case. 15

1. The Sixth Circuit's application of this Court's ineffective assistance of counsel precedents was routine and proper. This Court has already rejected objections similar to those of the Warden and the dissent below in its previous ineffective assistance of counsel habeas cases. 15

2. The Warden's claimed impact of the Sixth Circuit's opinion is based on an inaccurate characterization of the court's decision and an improper approach to the ineffective assistance of counsel analysis. 17

B. *Spisak's* issues are distinct from those involved in Mason's case and do not justify holding this petition pending a decision in that case. 22

CONCLUSION 23

TABLE OF AUTHORITIES

Cases — Page(s)

Mason v. Ohio,
525 U.S. 1057 (1998) 6

Rompilla v. Beard,
545 U.S. 374 (2005) 4

Spisak v. Mitchell,
465 F.3d 684 (6th Cir. 2006) 22

Smith v. Spisak,
No. 08-724 (cert. granted Feb. 23, 2009) 1, 14

State v. DePew,
528 N.E.2d 542 (Ohio 1988) 11, 20

Strickland v. Washington,
466 U.S. 668 (1984) ..... *passim*

United States v. Cronic,
466 U.S. 648 (1984) 23

Wiggins v. Smith,
539 U.S. 510 (2003) ..... *passim*

Williams v. Taylor,
529 U.S. 362 (2000) ..... *passim*

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Respondent, Maurice Mason, respectfully requests that this Court deny the Warden's petition for a writ of certiorari, and also asks the Court to deny the Warden's alternative request to hold this petition pending this Court's decision in *Smith v. Spisak*, No. 08-724 (cert. granted Feb. 23, 2009), which the Warden acknowledges presents issues distinct from those presented here, *see* Brief of Petitioner at 42, 44, *Smith v. Spisak*, No. 08-724 (filed May 22, 2009).

OPINIONS BELOW

The petition accurately lists the opinions below.

JURISDICTIONAL STATEMENT

The Respondent concurs in the statement of jurisdiction in the petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in relevant part: "In all criminal prosecutions, the accused shall . . . have the assistance of counsel for his defense."

The Fourteenth Amendment to the United States Constitution provides, in relevant part: "[N]or shall any State deprive a person of life, liberty, or property, without due process of law."

Section 2254 of Title 28 of the United States Code provides, in relevant part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

INTRODUCTION

On the eve of the penalty phase of his client's capital murder trial, trial counsel made what the Warden characterizes as "strategic" decisions to forgo further investigation and to forgo a mitigation presentation concerning his client's bizarre childhood. At that point, however, having conducting virtually no investigation into potential mitigating evidence and with just five days remaining before the beginning of the penalty phase, counsel's decision hardly represented a considered tactical choice among competing alternatives. In light of his deficient investigation, it was in fact counsel's only option.

Although he had been appointed to represent Mason and had assumed the role of mitigation counsel on the case nearly nine months earlier, in October of 1993, counsel's records reflect that the bulk of his work for the first six months consisted of preparations for the trial phase and unsuccessful attempts to obtain mitigation assistance from the Ohio Public Defender's Office and to obtain funding from the trial court for an independent mitigation specialist. In May and early June of 1994, counsel obtained funding for a brief psychiatric examination regarding his client's potential for rehabilitation and/or his potential for future dangerousness. This examination, however, did not focus on any of the detrimental aspects of Mason's childhood or their effect on his behavior. Finally, on June 22, 1994, with less than a week remaining before the penalty phase of his client's trial was to begin, counsel turned his attention to the merits of a mitigation presentation concerning his client's background.

Having failed by then to engage in anything more than a rudimentary inquiry into his client's

background, counsel was out of time and out of options. Counsel had not conducted a single in-depth interview with any of his client's relatives — not his client's mother, his client's father, nor any of his client's several brothers and sisters — even though the few records counsel *had* reviewed revealed that his client had been born into a drug-dependent family; that his client's parents had both been incarcerated for dealing drugs; that a psychological evaluation of his client as a teenager documented his exposure to significant violence; and that a police report created when his client was 13 years old noted visible injuries (including multiple cuts, scars, and swelling on his face, arms, and back) that were the result of beatings by his father. In nearly nine months of representation, however, counsel had not investigated any of these areas of concern. With the penalty phase looming, counsel's decision to forgo further investigating and presenting family background mitigation was not based on a reasonable investigation and was not therefore a "strategic" decision owed any deference. As a result of his procrastination and inattention, and with just five days left to prepare for the penalty phase, giving up for good on tracking down these leads was counsel's only remaining option.

The Warden argues that counsel was faced with the risk that the trial judge would permit the prosecutor to introduce undesirable evidence concerning his client's criminal past, relying on a state law that allowed the prosecutor to rebut false or incomplete testimony about a defendant's *criminal record*. While the analysis supporting the admissibility of such rebuttal evidence in response to testimony concerning purely the defendant's troubled *childhood* is dubious, it is beside the point. The Sixth Circuit properly concluded that counsel was in no position to make an informed assessment about the comparative benefits of introducing mitigating evidence about his client's miserable home life. Even if the risk the trial court would admit the potentially damaging

information about his client's criminal activity was realized, without having sufficiently investigated the mitigating evidence, counsel could not have weighed the harmful evidence he knew against the helpful evidence he had failed to investigate. As this Court has observed in a related context, this record "underscores the unreasonableness of counsel's conduct by suggesting that [his] failure to investigate thoroughly resulted from inattention, not reasoned strategic judgment." *Wiggins v. Smith*, 539 U.S. 510, 526 (2003).

The Sixth Circuit's decision represents a straightforward application of this Court's well-established precedent concerning an ineffective assistance of counsel claim. Specifically, as this Court did in *Williams v. Taylor*, 529 U.S. 362 (2000), *Wiggins*, 539 U.S. at 510, and *Rompilla v. Beard*, 545 U.S. 374 (2005), the Sixth Circuit determined that counsel failed "to undertake a reasonable investigation to support [his] strategic decisions about the presentation of mitigation evidence," App. 34a, and accordingly, granted Mason relief for his counsel's deficient performance. The Sixth Circuit judged counsel's performance under a standard fully consistent with, and no more demanding than, the one this Court articulated in *Strickland v. Washington*, 466 U.S. 668 (1984), and repeatedly applied in *Williams*, *Wiggins*, and *Rompillia*.

Although the Sixth Circuit's decision is legally sound, even if it were not, this Court should not accept review merely to correct errors in the application of the proper rule of law to the facts of a particular case. The Sixth Circuit broke no new ground in its decision, and the Warden has not suggested that its statement of the applicable law conflicts with that of any other court. The Warden's objections all flow from a disagreement with the Sixth Circuit's fact-specific determination that Mason's counsel had not conducted sufficient investigation upon which to premise his decision to terminate further inquiry into his client's background. The Sixth Circuit's

analysis of the facts of this case under the *Strickland* standard thus impacts Mason's case, but few, if any, others. Likewise, as the Warden's other briefing before this Court makes clear, the issues at stake in *Smith v. Spisak*, another Sixth Circuit capital case set for argument this term, are not sufficiently related to those in Mason's case to justify holding this petition. For these reasons, Respondent respectfully requests that this Court deny the petition.

STATEMENT OF THE CASE

A. After a jury convicted and sentenced Mason to death in state court, he unsuccessfully pursued direct appeals.

A jury found Maurice Mason guilty on June 18, 1994, of three counts, each with a firearm specification: (1) aggravated murder, with a death penalty specification that the murder occurred during the commission of a rape; (2) rape, with a prior aggravated felony specification; and (3) having a weapon while under disability, with an offense of violence specification. App. 10–11a.

Mason's penalty phase began on June 27, 1994. App. 11a. After considerable deliberation, the jury indicated it was "unable to reach a unanimous decision on any one of the sentencing options." App. 12a (internal quotation marks omitted). The Court inquired whether the foreman thought they could reach a verdict if they were given additional time. *Id.* The foreman responded, "No." *Id.* (internal quotation marks omitted). Despite this unequivocal response, the trial court sent the jury back to the jury room to deliberate further. *Id.* The next day the jury returned a death verdict. *Id.* The trial court accepted the verdict and sentenced Mason to death for aggravated murder. *Id.*

Mason filed a timely appeal in which he raised twenty-four issues. *Id.* The Ohio Court of Appeals for the Third Appellate District affirmed his conviction and sentence. App. 12a–13a.

Mason then appealed to the Ohio Supreme Court, which also affirmed Mason's conviction and death sentence. App. 13a. This Court denied Mason's petition for a writ of certiorari on December 14, 1998. *Id.*

B. Mason unsuccessfully pursued post-conviction relief in state and federal district court.

While he was litigating his direct appeals, Mason filed a collateral attack in the state trial court, asserting seven assignments of error. *Id.* On November 21, 1996, the court denied relief without holding an evidentiary hearing. *Id.* Mason appealed the dismissal of his post-conviction petition, and the state appellate court affirmed the judgment of the trial court on June 6, 1997. *Id.* Mason then filed a timely appeal to the Ohio Supreme Court, which dismissed the appeal on October 15, 1997, as not involving any substantial constitutional question. App. 303a–304a.

On July 15, 1999, Mason filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254, raising twenty-five challenges to his conviction and sentence. App. 13a–14a. On May 9, 2000, the district court denied Mason's habeas petition and his motion for an evidentiary hearing on various claims. App. 188a. The district court subsequently granted a certificate of appealability as to all claims, and Mason timely appealed. App. 14a.

C. On appeal, the Sixth Circuit noted troubling indications that counsel had failed to properly investigate mitigating evidence and therefore remanded Mason's case for the district court to develop evidence to evaluate his penalty-phase ineffective assistance of counsel claim.

The Sixth Circuit affirmed the district court's ruling in part, but remanded the case to the district court for an evidentiary hearing on Mason's claim that he had been denied the effective assistance of counsel at the penalty phase of his capital trial. App. 106a–107a. Finding "inexplicable the apparent failure of trial counsel to investigate mitigating evidence in this case,"

App. 134a n.13, the Court noted that the facts before it indicated "a significant likelihood that defense counsel acted unreasonably in failing to conduct an independent and thorough investigation of Mason's background." App. 128a. Because the record was inadequate to allow the court to meaningfully review that claim, it remanded the case to the district court for an evidentiary hearing on this issue. App. 136a.

After a lengthy evidentiary hearing and post-hearing briefing, the district court again denied Mason's claim. App. 60a–61a. He timely appealed.

D. Reviewing the evidence generated at the evidentiary hearing in a second appeal, the Sixth Circuit held that "trial counsel provided ineffective assistance by failing to interview Mason's family members and investigate the obvious red flags contained in state records suggesting that Mason's childhood was pervaded by violence and exposure to drugs in the home from an early age."

In Mason's second appeal following the district court's decision on remand, the Sixth Circuit considered Mason's claim in light of the evidence introduced at the evidentiary hearing. Proceeding under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (Apr. 24, 1996), the Sixth Circuit identified the clearly established law governing Mason's ineffective assistance claim, noting that, "as in *Strickland*, *Williams*, *Wiggins*, and *Rompilla*, Mason's claim stems from counsel's decision to limit the scope of their investigation into potential mitigating evidence to be presented at the sentencing phase of a capital trial." App. 17a (internal quotation marks and citation omitted). The court held that counsel's performance was deficient and objectively unreasonable, that Mason was prejudiced as a result, and that the Ohio Supreme Court unreasonably applied clearly established federal law in rejecting Mason's ineffective assistance of counsel claim. App. 19a.

1. The Sixth Circuit held counsel's "woefully inadequate" investigative efforts

rendered his performance deficient and objectively unreasonable.

First, applying the clearly established law "regarding what constitutes a reasonable investigation of mitigating evidence at the sentencing stage —and of the circumstances that trigger counsel's obligation to investigate further—," the court held that counsel's performance "was deficient and objectively unreasonable." App. 19a-20a. Testimony at the evidentiary hearing established that counsel did not select his strategy for the penalty phase of trial until June 22, 1994, just days prior to the mitigation hearing. App. 20a. The court therefore focused its evaluation of counsel's performance "on what knowledge [he] then possessed regarding Mason's childhood and background and what investigation and interviews, if any, that [he] had performed prior to making that decision." App. 20a–21a (citing *Wiggins*, 539 U.S. at 527 ("*Strickland* does not establish that a cursory investigation automatically justifies a tactical decision with respect to sentencing strategy. Rather, a reviewing court must consider the reasonableness of the investigation said to support that strategy.")). The court concluded that the evidentiary hearing demonstrated that counsel had "relied almost exclusively on the records provided by the state and inexplicably failed to conduct his own independent investigation and interview members of Mason's family regarding the circumstances of his childhood and background." App. 25a. *See also* App. 25a–31a (citing testimony and records demonstrating that counsel "*never* conducted any indepth interviews with *any* of Mason's relatives" and that counsel's few brief contacts with certain members of Mason's family all occurred after June 22, the day counsel decided to forgo further investigation and any mitigation presentation about Mason's background or childhood).

In light of this Court's precedents, particularly those enforcing the minimum standards for reasonable mitigation investigations, *see* App. 21a–24a (citing and quoting *Wiggins*, 539 U.S. at

524–28; *Rompilla*, 545 U.S. at 381–90), the court held that counsel's performance was deficient, App. 34a. It noted that "although state records contained information suggesting that Mason's childhood was marked by violence and pervasive drug use," the evidence demonstrated that counsel's "investigative efforts to learn any further details about Mason's background were woefully inadequate." App. 33a–34a. These "efforts consisted of no more than reviewing documents provided by the state, arranging for a psychiatric evaluation limited to predicting Mason's future dangerousness, talking to Mason himself, and very briefly talking to a small subset of Mason's family members." App. 34a.

2. **The Sixth Circuit held counsel's deficient performance prejudiced Mason because a reasonable probability existed that, had the jurors (who had initially deadlocked) heard the substantial evidence detailing the abusive and unhealthy conditions of Mason's childhood, they might have returned a different penalty-phase decision.**

Next, again applying clearly established law, the court held that counsel's deficient performance prejudiced Mason. *Id.* Had counsel not abandoned his investigation, the court reasoned, he could have discovered "substantial evidence detailing the abusive and unhealthy conditions of [Mason's] childhood." *Id.* The evidentiary hearing demonstrated that, for three years, Mason's father ran a prostitution ring, and Mason's mother shot his father because of his involvement with prostitution. *Id.* Mason's father also operated a home-based drug business that employed ten drug sellers. *Id.* Both of Mason's parents used drugs daily and also trafficked drugs. App. 34a–35a. Mason had experimented with drugs when he was eight years old, and Mason's father took him along on trips to purchase and sell drugs while Mason was in the sixth and seventh grades. App. 35a. Mason's parents regularly abused Mason and isolated him from anyone not associated with their drug-dealing activities. *Id.* Largely as a result of this dysfunctional home

environment, Mason developed a borderline personality disorder. *Id.*

Evaluating this evidence, the court concluded that Mason "'has the kind of troubled history'" that this Court has "'declared relevant to assessing a defendant's moral culpability,'" and therefore held that "'had the jury been confronted with this considerable mitigating evidence, there is a reasonable probability that it would have returned with a different sentence.'" *Id.* (quoting *Wiggins*, 539 U.S. at 534, 536). Because Mason could "demonstrate prejudice by establishing that 'there is a reasonable possibility that at least one juror would have struck a different balance,'" App. 18a (quoting *Wiggins*, 539 U.S. at 537), and because "Mason's jury initially reported a deadlock regarding his sentence," the court reasoned that "[e]ven a slightly more compelling case for mitigation . . . might have altered the outcome of the sentencing phase of Mason's trial," App. 34a.

The court reasoned that Mason's showing of prejudice was not diminished by any perceived risk that the prosecutor would have introduced unfavorable evidence about Mason's criminal record if counsel had offered mitigating evidence regarding Mason's childhood. It explained that "testimony that purely concerned Mason's troubled childhood would not give the prosecutor the same opportunity for rebuttal that evidence about good character or rehabilitation potential could have." App. 36a (internal quotation marks omitted); *see also id.* (explaining that "the Ohio Supreme Court held that if 'a mitigation witness called by the defense *falsely or incompletely testifies on the extent of the defendant's criminal record*, the prosecutor should be permitted to rebut,'" but "emphasized that '[t]his right is limited, however, to those instances where the defense offers a *specific assertion*, by a mitigation witness or by the defendant, *that misrepresents the defendant's prior criminal history*'") (quoting *State v. DePew*, 528 N.E.2d 542, 555 (Ohio 1988)). It also noted that the trial court never opined that it would admit the rebuttal evidence if "counsel presented only

evidence detailing Mason's troubled childhood, most likely because Mason's counsel never investigated Mason's childhood nor planned to present such evidence." App. 38a. *See also* App. 39a–42a (discussing pre-trial proceedings and evidentiary hearing testimony that demonstrated that "the admissibility of the prosecutor's rebuttal evidence hinged on whether the defense would make use of [the psychiatric doctor's] deposition testimony that misstated Mason's *criminal* history," and noting that "[w]hether the trial court would have admitted the prosecutor's rebuttal evidence in response to a defense strategy based solely on the circumstances of Mason's troubled childhood remains a hypothetical question because [counsel] never planned to present such a defense"). For these reasons, the court found that the district court's conclusion that Mason had not demonstrated prejudice was based on a flawed understanding of the possibility that the prosecutor could have introduced rebuttal evidence about Mason's criminal history. App. 35a–36a.

3. **The Sixth Circuit held that the Ohio Supreme Court unreasonably applied clearly established law because it ignored the principle established in *Strickland* that "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation."**

Finally, the Sixth Circuit determined that Mason was entitled to habeas relief under AEDPA because "the Ohio Supreme Court unreasonably applied clearly established federal law in denying his claim." App. 42a (citing 28 U.S.C. § 2254(d))

First, the court explained that "[t]he Ohio Supreme Court unreasonably applied the *Strickland* standard in rejecting Mason's claim because the Ohio Supreme Court ignored the principle established in *Strickland* that 'strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.'" App. 44a (quoting *Strickland*, 466 U.S. at 690–91 and citing *Williams*, 529 U.S. at

396 (finding deficient performance because "trial counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background")). While the state court had noted some of counsel's investigative activities, the Sixth Circuit reasoned that the state court had "failed to consider whether Mason's counsel conducted any interviews with Mason's family members or performed any investigation beyond examining the documents that the state provided to them and talking to Mason." App. 44a–45a. Without considering this gap in counsel's performance, the court explained, the state court "simply asserted that Mason's counsel had made a strategic decision regarding mitigation strategy." App. 45a. Thus, the court held that the state court's failure "to assess whether a thorough and reasonable investigation supported counsel's strategic decision . . . constitute[d] an unreasonable application of *Strickland*." *Id.* (citing *Wiggins*, 539 U.S. at 527 (observing that "the Maryland Court of Appeals appears to have assumed that because counsel had *some* information with respect to petitioner's background—the information in the [state] records—they were in a position to make a tactical choice not to present a mitigation defense," and characterizing the state court's application of *Strickland* as "objectively unreasonable" because "the [state] court did not conduct an assessment of whether the decision to cease all investigation upon obtaining the [state] records actually demonstrated reasonable professional judgment")).

In addition, the Sixth Circuit held that the analysis supporting the Ohio Supreme Court's decision that Mason had failed to show prejudice was also flawed and objectively unreasonable. *Id.* The Sixth Circuit reasoned that the Ohio Supreme Court had misunderstood Mason's argument when it considered the risk that the prosecutor could have introduced evidence about Mason's criminal past. The Ohio court had analyzed whether presenting evidence "'as to his good character and rehabilitation potential' would risk rebuttal evidence." App. 46a (quoting App. 341a). As the Sixth

Circuit explained, however, that was not the proper consideration. *Id.* Mason's argument was that "his counsel should have presented a mitigation case focusing on his childhood, dysfunctional family, and his emotional psychological problems, *not* his good character or rehabilitation potential." *Id.* Because introducing this background evidence would certainly not entail the same risk as introducing character and rehabilitation evidence based on inaccurate characterizations of Mason's criminal history, the Sixth Circuit concluded that the Ohio Supreme Court was objectively unreasonable in holding "that Mason failed to show prejudice by invoking the spectre of rebuttal evidence responding to a mitigation strategy that Mason was not advocating." *Id.*

For all of these reasons, the Sixth Circuit granted Mason a conditional writ of habeas corpus. *Id.* The Sixth Circuit denied the Warden's request for rehearing or rehearing en banc. App. 3a–4a.

REASONS FOR DENYING THE WRIT

This Court should deny the Warden's petition for several reasons. First, the Sixth Circuit's decision does not present an issue worthy of this Court's consideration. The legal standard identified by the lower court does not conflict with that of any other circuit; indeed, the opinion represents a routine application of this Court's well-established precedents. In fact, the dissent's and the Warden's complaints mirror those this Court has previously rejected in similar cases.

Second, the Warden's assertion that the decision has set an unreasonably high standard for trial counsel's mitigation performance is misplaced. Far from imposing on trial counsel the dilemma that the Warden fears, the decision simply requires, as this Court has required numerous times before, that counsel conduct an investigation sufficient to support a reasonable strategic decision before it grants unreviewable status to such a decision.

Finally, the issues presented by this case are distinct from those involved in another Sixth

Circuit case presently pending before this Court, *Smith v. Spisak*, No. 08-724 (cert. granted Feb. 23, 2009). The Warden has acknowledged as much, *see* Brief of Petitioner at 42, 44, *Smith v. Spisak*, No. 08-724 (filed May 22, 2009). Consequently, no reason exists to hold this case pending the decision in *Spisak*.

A. The Warden seeks review in this Court merely to change the result in this case.

The Warden does not attempt to manufacture a circuit split here, for good reason: none exists. The Sixth Circuit did not forge new ground in applying this Court's well-established ineffective assistance of counsel standards to Mason's claim.

Although "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law," S. Ct. R. 10, the Warden requests review in this Court merely for this reason. The Warden does not dispute that the Sixth Circuit properly stated the rule of law regarding ineffective assistance of counsel and this Court's amplification of it in *Strickland*, *Williams*, *Wiggins*, and *Rompilla*. The Warden contests only the application of those rules to the facts of Mason's case. Specifically, the Warden's arguments all flow from its objection to the court's conclusion that Mason's counsel had sufficient information to support his decision to abandon further investigation into his client's background. *See* Pet. at 15-20.

While the Sixth Circuit's resolution of the case based on these facts and law was correct, even if it were not, granting the petition here would have little, if any, impact beyond the litigants in this case. Denial is therefore proper.

1. The Sixth Circuit's application of this Court's ineffective assistance of counsel precedents was routine and proper. This Court has already rejected objections similar to those of the Warden and the dissent below in its previous ineffective assistance of counsel habeas cases.

The Sixth Circuit's finding that Mason was denied the effective assistance of counsel, where counsel had failed to turn his attention to a crucial category of potential mitigating evidence until just five days before the penalty phase of trial was to begin (and at that point, decided to simply abandon ever thoroughly investigating this evidence), was hardly novel. Indeed, this Court noted that the State "barely disputed" in its brief in *Williams* that counsel's representation during the sentencing phase in that case fell short of professional standards where they "did not begin to prepare for that phase of the proceeding until a week before the trial." *Williams*, 529 U.S. at 395.

Likewise, this Court acknowledged in *Wiggins* that *Strickland's* long-established standards impose a duty on counsel to adequately investigate mitigation evidence. This rule means that performance is deficient where counsel consults only a few limited sources for information about his client's background. In *Wiggins*, this Court found counsel disregarded well-defined professional norms and "abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources." *Wiggins*, 539 U.S. at 524. The *Wiggins* Court also explained that even though "counsel had some information with respect to petitioner's background," they were not "in a position to make a tactical choice not to present a mitigation defense" because, "[i]n assessing the reasonableness of an attorney's investigation . . . a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Id.* at 527.

In response to the objection that Wiggins' counsel had "limited the scope of their investigation for strategic reasons," this Court noted that "*Strickland* does not establish that a cursory investigation automatically justifies a tactical decision with respect to sentencing strategy," and emphasized that "a reviewing court must consider the reasonableness of the investigation said to

support that strategy." *Id.* Moreoever, this Court explained that when counsel ignores red flags and truncates a mitigation investigation prematurely, an informed decision deserving of deference is not possible. In light of the information Wiggins' counsel knew at the time they terminated their mitigation investigation, this Court concluded that "counsel chose to abandon their investigation at an unreasonable juncture, making a fully informed decision with respect to sentencing strategy impossible." *Id.* at 527-28. This early termination of the investigation rendered the lower court's "assumption that the investigation was adequate" an "unreasonable application of *Strickland*" and "the court's subsequent deference to counsel's strategic decision" "objectively unreasonable" because "counsel based this alleged choice on . . . an unreasonable investigation." *Id.* at 528.

The Sixth Circuit applied these rules to Mason's case, properly determining that counsel's narrow, abbreviated investigation was insufficient to insulate counsel's decision to abandon the investigation as an unreviewable "strategic" decision.

2. The Warden's claimed impact of the Sixth Circuit's opinion is based on an inaccurate characterization of the court's decision and an improper approach to the ineffective assistance of counsel analysis.

The Warden complains that the effect of the Sixth Circuit's decision was to place counsel in an "impossible position of having to choose between providing ineffective assistance in one of two ways." Pet. at 4. These allegations are unfounded. The Warden assumes: (1) that counsel would have been found ineffective if he had chosen the option of introducing mitigating evidence and risking the admission of unfavorable rebuttal evidence by the State in response; and (2) that the Sixth Circuit found him ineffective for instead choosing the alternative of refraining from introducing the mitigating evidence. But this catch-22 characterization of the implications of the panel's decision is wholly inaccurate.

The Sixth Circuit did *not* hold that Mason's trial counsel was ineffective for "failing to introduce mitigating evidence" during the penalty phase of his trial. Pet. at 4. Rather, the court held that counsel failed "to undertake a reasonable investigation to support [his] strategic decisions about the presentation of mitigation evidence," App. 34a, a decision fully consistent with law clearly established by this Court. As this Court recognized in *Wiggins*, if "the investigation supporting" counsel's alleged strategic choice "was unreasonable," then counsel simply was "not in a position to make a reasonable strategic choice" about the mitigation strategy. *Wiggins*, 539 U.S. at 536. *See also id.* at 522–23 (The "principal concern in deciding whether [counsel] exercised 'reasonable professional judgment,' is not whether counsel should have presented a mitigation case. Rather, we focus on whether the investigation supporting counsel's decision not to introduce mitigating evidence . . . *was itself reasonable*.") (quoting *Strickland*, 466 U.S. at 691).

To be sure, federal habeas courts cannot second-guess the reasonable strategic decisions of trial counsel. The Sixth Circuit, however, concluded that Mason's trial counsel never was in a position to make a reasonable strategic decision because counsel had not conducted an investigation adequate to require the court's deference. Counsel's mistake, therefore, was not in choosing the lesser of two reasonable strategies; his mistake was in failing to be sufficiently informed to make a reasoned strategic choice in the first place.

Thus the Warden's protest erroneously focuses on the tradition that counsel's strategic decisions "'are virtually unchallengeable,'" Pet. at 13 (quoting *Strickland*, 466 U.S. at 690), while ignoring that courts apply this deferential standard *only* if the decisions are made "after thorough investigation of law and facts relevant to plausible options," *Strickland*, 466 U.S. at 690. On the other hand, "strategic choices made after less than complete investigation are reasonable precisely

to the extent that reasonable professional judgments support the limitations on investigation." *Id.* at 690–91. In all events, however, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.* at 691.

The framework of these governing standards demonstrates that the Warden's proposed approach to the analysis is backwards. The Warden defends trial counsel's decision to limit the mitigation presentation as a strategic choice and *then* suggests that counsel's "corresponding decision to limit his mitigation investigation accordingly" is entitled to deference. Pet. at 11. But the premise of the Warden's position — that the decision to limit the mitigation investigation flowed from a reasonable strategic decision — is flawed. The decision to limit the investigation was not reasonable because counsel did not fulfill the investigative duty recognized in *Strickland before* making that decision. An uninformed "strategic" decision cannot retroactively justify the very same limits on the investigation that made the decision unreasonable in the first place. Cf. *Wiggins*, 539 U.S. at 526–27 ("When viewed in this light, the 'strategic decision' the state courts and respondents all invoke to justify counsel's limited pursuit of mitigating evidence resembles more a post-hoc rationalization of counsel's conduct than an accurate description of [his] deliberations prior to sentencing.").

The Warden also argues that "counsel's mitigation investigation was sufficient because Mason cannot identify any significant aspect of his background about which counsel was unaware before he selected a mitigation strategy." Pet. at 14. But once again, the Warden approaches the analysis improperly, attempting to import a prejudice consideration into the performance assessment. In doing so, the Warden tries to justify the reasonableness of counsel's decision to call off the mitigation investigation not with what counsel knew at the time he made the decision, but with what

he would have turned up had he decided differently. The Warden's attempt is unpersuasive. A hindsight "strategic" justification cannot change the fact that counsel's inadequate investigation had rendered him unable to make an informed tactical decision at the time he made it.

For these same reasons, the proper resolution of the evidentiary question concerning potential rebuttal evidence is irrelevant. First, the Sixth Circuit explained that it did not defer to the state court's evaluation of this issue because that court did not analyze a fair construction of Mason's argument, making the court's analysis objectively unreasonable. Rather than confronting Mason's actual argument — that his counsel should have introduced mitigating evidence about his *family background and troubled childhood* — the Ohio Supreme Court instead characterized the risk of rebuttal evidence as being implicated by mitigating evidence about Mason's "*good character and rehabilitation potential*." App. 341a (emphasis added). The Sixth Circuit properly held that the state court's rejection of its own strawman construction of the Mason's argument did not deserve AEDPA deference.

In addition, under an accurate formulation of Mason's argument, the Sixth Circuit persuasively explained why the law that allows a prosecutor to introduce evidence to rebut testimony that "'falsely or incompletely [characterizes] the extent of the defendant's *criminal record*'" would not have given the prosecutor an opportunity to rebut "testimony that purely concerned Mason's troubled childhood." App. 36a (quoting *State v. DePew*, 528 N.E.2d at 555)) (emphasis modified). And, "most likely because Mason's counsel never investigated Mason's childhood nor planned to present such evidence," the Sixth Circuit pointed out, the trial court never gave an opinion to the parties regarding the admissibility of the threatened evidence to rebut that type of testimony. App. 38a.

Even if the state courts would have decided that hypothetical evidentiary issue differently, however, Mason would still be entitled to relief. As the Sixth Circuit properly concluded, counsel was in no position to make an informed assessment about the comparative benefits of introducing mitigating evidence about his client's miserable home life. Without having sufficiently investigated the mitigating evidence, counsel could not have weighed the harmful evidence he knew against the helpful evidence he had failed to investigate. And as this Court recognized in *Williams*, where "not all of the additional evidence was favorable" to the defendant, "the failure to introduce the comparatively voluminous amount of evidence that did speak in [the defendant's] favor was not justified by a tactical decision to focus on" another mitigation approach because "[w]hether or not those omissions were sufficiently prejudicial to have affected the outcome of sentencing, they clearly demonstrate that trial counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background." *Williams*, 529 U.S. at 396 (citing 1 ABA Standards for Criminal Justice 4-4.1, commentary, p. 4–55 (2d ed. 1980)). As the record in this case "underscores the unreasonableness of counsel's conduct by suggesting that [his] failure to investigate thoroughly resulted from inattention, not reasoned strategic judgment," *Wiggins*, 539 U.S. at 526, the Sixth Circuit correctly held that Mason has receive ineffective assistance of counsel, regardless of whether it correctly assessed the ancillary evidentiary issue.

B. ***Spisak's* issues are distinct from those involved in Mason's case and do not justify holding this petition pending a decision in that case.**

Alternatively, the Warden asks this Court to hold the petition pending its decision in *Smith v. Spisak*, No. 08-724, set for argument in October, 2009. The Warden, however, makes no serious attempt to link the issues in Mason's case with those in Spisak's. In fact, the Warden has also

asserted just the opposite. As the Warden has acknowledged in other briefing before this Court, the deficiencies the Sixth Circuit found in the performance of Spisak's counsel have nothing in common with the failure of Mason's counsel to adequately investigate potential mitigating evidence. *See* Brief of Petitioner at 42, *Smith v. Spisak*, No. 08-724 (filed May 22, 2009) ("In fact, the Sixth Circuit rejected Spisak's argument that counsel performed an inadequate mitigation investigation, finding that counsel had collected an extensive social history.") (internal quotation marks omitted). Indeed, in the Warden's words, Spisak's case stands "[i]n sharp contrast to" cases where habeas petitioners succeeded in establishing, among other claims, that counsel erred by conducting "an unreasonable mitigation investigation," because Spisak's "trial counsel . . . adequately investigated and presented Spisak's best chance of mitigation to the jury . . . ." *Id.* at 44 (internal quotation marks omitted). The Warden cannot have it both ways.

Even without the Warden's concession, it is apparent that the Sixth Circuit's analysis in Spisak's case focused on Spisak's entitlement to habeas relief not for an inadequate mitigation investigation, but "on the basis of counsel's hostile and inept statements and lack of advocacy during the closing argument of the mitigation phase of the trial." *Spisak v. Mitchell*, 465 F.3d 684, 708 (6th Cir. 2006). *See also Spisak v. Hudson*, No. 03-4034, 2008 U.S. App. LEXIS 7760, at *2 (6th Cir. April 11, 2008) (amended order) (explaining that the Sixth Circuit "found that Petitioner was prejudiced by his counsel's deficient performance at the sentencing phase of Petitioner's trial" because his "counsel's closing argument focused almost entirely on the heinous nature of Petitioner's crimes and his deficient nature as a person" and "in no way attempted to rehabilitate Petitioner in the eyes of the jurors who would eventually have to decide whether to recommend the death penalty"). Moreover, the Sixth Circuit specifically recognized that this Court "has now applied

Strickland in the AEDPA context at least three times to hold that a defense attorney's failure to adequately investigate and present mitigating evidence at the sentencing phase of a death penalty trial constitutes ineffective assistance of counsel," *Spisak*, 465 F.3d at 707 (citing *Rompilla*, 545 U.S. at 383; *Wiggins*, 539 U.S. at 537–38; and *Williams*, 529 U.S. at 390), but held that it did not agree with Spisak that "trial counsel was ineffective in failing to properly investigate Defendant's background," *id.*

Finally, the Warden has asserted that the ineffective-assistance-of-counsel question presented by *Spisak* is whether the Sixth Circuit erred "when it applied *United States v. Cronic*, 466 U.S. 648 (1984), to presume that a habeas petitioner suffered prejudice from several allegedly deficient statements made by his trial counsel during closing arguments," Brief of Petitioner at i, *Smith v Spisak*, No. 08-724 (filed May 22, 2009), and he has made no similar assertion that the Sixth Circuit wrongly applied *Cronic*, or any decision other than *Strickland* (and cases following it), in deciding Mason's case. Because this Court's decision in *Spisak* will not bear on the Sixth Circuit's analysis in Mason's case, it should not grant the Warden's request to hold the petition.

CONCLUSION

For these reasons, the Court should deny the petition for a writ of certiorari, and also deny the Warden's alternative request to hold this petition pending its decision in *Spisak*.

Respectfully submitted,

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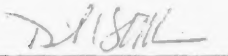
By: 
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